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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MADALYN MURRAY O'HAIR
and
JON G. MURRAY,
.....Petitioners,

v.

WILLIAM CLEMENTS, et al
..... Respondents,

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does state sponsored, through permission given to a private group, display of a *creche* (nativity scene), as representation of the birth of Jesus Christ in the Christian tradition (*Luke 2:1-21*), in the Texas Capitol Rotunda, as a state function

[1] have a clearly secular purpose;

[2] neither advance nor inhibit religion;

[3] entangle the state government of Texas with religion excessively?

2. Does permission given by the Texas Board of Control for such display, for its storage by the state during off season, for the use of the state facilities and furnishing of electric lights for such display (which display, erection, dissemblage and storage is done by state employees on regular duty hours) and for the holding of a Christmas celebration or Christmas (i.e. religious) caroling by state employees (excused from work for the function by the governor) and others in the Texas Capitol Rotunda,

[1] have a clearly secular purpose;

[2] neither advance nor inhibit religion;

[3] entangle the state government of Texas with religion excessively?

3. Does the state sponsored, by permission given to a private person, display of a Jewish menorah and the celebration of the Jewish Festival of Lights in the Texas Capitol Rotunda

[1] have a clearly secular purpose;

[2] neither advance nor inhibit religion;

[3] entangle the state government of Texas with religion ex-excessively?

4. Does the enforced recitation of an 11-word state composed prayer by the clerk of the court and the participation in the prayer by the sitting judges of that court at the daily opening sessions of the United States Fifth Circuit Court of Appeals, in New Orleans, Louisiana

[1] have a clearly secular purpose;

[2] neither advance or inhibit religion;

[3] entangle the judicial branch of the federal government with religion excessively?

5. Does a court order directing Atheists to leave the courtroom if they cannot accept the unconstitutional practice of prayer in a federal district court show bias of that court for religion and against Atheism thereby depriving the petitioners, who are A-theists, of an impartial trial?

## THE PARTIES

The parties to this proceeding are as listed in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

MADALYN MURRAY O'HAIR
and
JON MURRAY
..... Petitioners

v.
WILLIAM CLEMENTS, et al.
.....Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners, Madalyn Murray O'Hair and Jon Murray ask that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered February 2, 1981, affirming an order of the United States District Court for the Western District of Texas.

## OPINIONS BELOW

The judgment and opinion of the United States District Court, Western District of Texas, Austin Division is not reported. (See Appendix, p. 2a) The judgment and opinion of the Court of Appeals is reported in *638 F.2d, No. 2, 1231,* in *"Decisions without Published Opinions."* (See Appendix, p.1a).

## JURISDICTION

The jurisdiction of this Court is invoked on the grounds that the United States Court of Appeals for the Fifth Circuit has decided a federal question of establishment of religion in conflict with applicable legal standards derived in decisions of this Court, or has sanctioned a departure from such standards and decisions by a lower court, so as to call for an exercise of this Court's power of supervision.

The judgment of the Court of Appeals is dated and was entered February 2, 1981. Jurisdiction of this Court is timely and invoked under *28 U.S.C.A. sec. 2101 (c)* and *28 U.S.C.A. sec. 1254 (1)* in light of *Rule 19* of the *Rules of the Supreme Court of the United States.*

## CONSTITUTIONAL PROVISIONS INVOLVED

### FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, . . .

### FOURTEENTH AMENDMENT

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Plaintiffs filed a complaint for preliminary and permanent injunction, declaratory and monetary relief in the United States District Court for the Western District of Texas on 13th December, 1977. They also sought costs and, pursuant to 42 U.S C. Sec. 1988, attorney's fees.

A hearing was had on the motion for preliminary injunction on 21st December, 1977 when such motion was denied. The appeal for Mandamus on the Preliminary Injunction was denied without hearing by the United States Court of Appeals, Fifth Circuit , on 22nd December, 1977.

Agreed facts stipulated by the parties was not filed until May, 1979, partially due to the absolute recalcitrant attitude of tactical delay followed by the counsel(s) for the Defendants. Motions for Summary Judgment were filed by both Plaintiffs and Defendants on the same date. In an order filed 31st January, 1980, the District Judge granted the Motion of Defendants and denied the Motion of Plaintiffs.

A timely appeal was filed on 5th February, 1980. The United States Court of Appeals, Fifth Circuit heard arguments on the case on January 29, 1981 and affirmed the decision of the United States District Court on February 2, 1981.

## SUMMARY OF ARGUMENT

The Supreme Court has developed a tripartite test to determine if a practice violates the Establishment Clause of the First Amendment. A statute or practice must reflect a "clearly secular" purpose, *Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L.Ed.2d (1968)*; have a primary effect which neither advances nor inhibits religion, *McGowan v. Maryland 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961); School District of Abington Township v. Schempp,* and *Murray v. Curlett, 374 S. 203, 83 S. Ct. 1560, 10 L.Ed. 2d 844 (1963);* and must avoid excessive governmental entanglement with religion. *Walz v. Tax Comm'n., 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed.2d 697 (1970).* See *Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1975), Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091, 29 L.Ed.2d 790 (1971)* and *Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 Ed.2d 948 (1973).*

Plaintiffs argue that the challenged practice satisfies none of these tests. They hold that the practice of giving permission to private persons to exhibit a *creche* or nativity scene in the Rotunda of the capitol building of the State of Texas, with that state providing storage, employees, electric power for the placement, erection, dissembling, and maintenance of that *creche* has no "clearly secular" purpose in the practice, that the primary purpose of the governor of the state of Texas releasing state employees from their duties so that they may practice Christmas celebration and Christmas (religious) caroling around the tree

and the *creche* has a primary effect of advancing religion, especially the Christian religion, that the complicated administrative procedures for obtaining permits, releasing employees from ordinary duties to work on the display, declaring "Governor's proclamations" and the like foster an excessive enganglement of government and religion.

With equal substance, the Plaintiffs hold that the celebration of a high religious season, very sacred, Jewish Festival of The Lights sacramental service in the Capitol Rotunda, together with the display of the holy Menorah of the Jewish religion has no secular purpose, that the primary purpose of such a display and celebration is inherently for the advancement of the Jewish religion and that the drawn out negotiations for the same excessively tangled government and religion to effectuate the celebrtion.

## REASONS FOR GRANTING THE WRIT

This District Court was under the obligation to analyze a claim of Establishment Clause violation by application of the tripartite test established by the Supreme Court, *supra.* Judge Roberts recognized and applied this test. He also recognized, correctly, that a practice is unconstitutional if it does not satisfy any one of these tests. However, he adopted the rationale of the *Allen* cases. *Allen v. Morton, 496 F.2d 65 (D.C. Cir. 1973)* [prior appellate opinion, *Allen v. Hickel, 424 F.2d 944 (1970)*; intervening district court opinion, *333 F. Supp. 1088 (1971)]*

placing all hope on the fact that the *creche* in the Texas Capitol Rotunda was smaller in size than the life-size *creche* in the *Allen* case. Size was not the issue. The District Court in *Allen* dismissed the action to enjoin the construction and maintenance of a *creche* on federal parkland because the *creche* did not offend the First Amendment as an object "to show how American people celebrate the holiday season," but the contention that the Pageant offended the sensibilities of some citizens was substantial enough to remand for an evidentiary hearing. At *p. 948* in this decision, the Court of Appeals, Leventhal, Circuit Judge, held, "The applicable rule may fairly be stated thus: The Government may depict objects with spiritual content, but may not promote or give its stamp of approval to such content." The State of Texas did not make the claim that the *creche* was an object "to show how American people celebrate the holiday season" but instead advanced the specious, if not ludicrous, contention that the sacred creche was merely another ornament for the tree.

Leventhal, Circuit Judge, in *Allen,* presaged this to note, at *p. 949,* "The danger to be apprehended is that it will appear to the public, those on the scene and those seeing it second hand (through television or hard media – ed.) that the Government has given a stamp of approval to the religious content of the Nativity scene. . . " The Court, therefore, suggested, that "an appropriate accompanying plaque might serve both to allay the impression of Government sponsorhip of religious belief and to set the proper representation of spiritual customs."

In a rehearing by the U. S. District Court (D.C.) in November, 1971, *Allen v. Morton, 333 Fed. Supp. 1088* the court held

that the original secular purpose of the Pageant was not violative of the Free Exercise or the Establishment Clauses of the First Amendment. As originally conceived, the alleged purpose of the entire Pageant was to atttract visitors to Washington, D. C., increase the business of local merchants, "increase the dollar volume of business and employment in the metropolitan area and to enhance the reputation of Washington, D. C. as a tourist and convention center." The affair was grandiose. The budget for lighting of trees alone was $30,000 a year. An illuminated stage was used for musical and ceremonial programs for a three--week spectacular, a pen of eight live reindeer was borrowed from the National Zoological Park. Fifty seven conifer trees represented the fifty states and seven torritories. The festivities were climaxed by a presidential greeting to the world. The United States financial involvement was about $72,000 a year to maintain the Pageant.

Under the admonishment of the Court of Appeals to disabuse the viewing public that the Govern ment had given a stamp of approval to the religious content, three plaques were introduced into the large park area. Once again the District Court found no First Amendment violation *Allen v. Hickel 333 F. Supp, 1088 (1971)* and the Plaintiffs appealed. In September, 1973, the U. S. Court of Appeals, *Allen v. Morton, 495 F.2d 65, (D.C. Cir.)* held that the changed position of the Government now reflected a clearly secular purpose *for the Pageant as whole* but that the Government involvement violated the "entanglement" test in that it included federal officers in planning and organization for the Pageant. The courts stayed away from

an analysis of the *creche* as if the baby Jesus had the plague.

Yet, that court held (1) that if the *creche* was discontinued no further question would arise; (2) that if the *creche* was re-retained and the government terminated all sponsorship, plaques with a disavowal of government sponsorship would still need to be displayed, (3) if the *creche* was retained and the government wanted to maintain connection with the Pageant as a whole it would be necessary for the Government to promulgate new or amended regulations "grounded in neutral principles and criteria assuring nondiscriminatory definition of the events," and appropriate disavowal plaques would still be necessary. The court admonished, at p. 74, that "Government involvement with religion should be kept to a necessary minimum, and that there should be avoided not only the actual interference but also the potential for an appearance of interference with religion."

Had the District Court applied the applicable *Nyquist* criteria to the case at bar:

(1) there is no secular purpose or intent shown in respect to the *creche* in the Texas Capitol Rotunda. A *post hoc* rationalization appeared that the secular purpose was that the *creche* was a mere ornament on the tree. There is no attempt in Texas to promote tourism, to advance Peace in the World, to promote goodwill to all men. In fact, a young Jewish woman was so offended by the *creche* that she demanded and obtained the right to practice a Jewish ceremonial rite for a few moments in 1979 to counter the 17-plus years of a full month each year of Christian celebration and revelry.

(2) There are no explanatory plaques, no disclaimers by the State of Texas. A majority of the community apparently view the display with approval because it reinforces their religious preferences and the State of Texas responds to that majoritarian viewpoint. This response is exactly what the First Amendment guarantees were designed to prevent. Such intent was disavowed by the Supreme Court of Oregon in *Lowe v. City of Eugene, 463 P.2d. 360 (1969)* which found a cross erected on city-maintained public land to be unconstitutional. A similar decision was given in *Fox v. Los Angels, 587 P.2d 663 (1968)* by the Supreme Court of California which found the lighting of a cross on the face of the City building to be an unconstitutional exercise.

(3) The admonition in these cases is that given in *Allen,* at p. 949 *supra.* "The danger to be apprehended is that it will appear to the public . . . that the Government has given a stamp of approval to the Nativity scene . . . "

In the *Memorandum Opinion and Order* of December 22, 1977, the trial judge noted that the State provides storage space for the creche off season, that it is put into place by state employees on state time, that the State pays for the electricity, that the state provides funds for the security and clean-up, 'that there is state "sponsorship and the like" for the Christmas ceremonies as well as for the display of the creche. Also the court found that the circumstances surrounding the display "confer some incidental benefit to religion." And, "No doubt that the import of the scene" is that "the figurines portray the birth of Christ as related in the teachings of most Christian

denominations."

Such circumstances bespeak of governmental entanglement, of the advance of the Christian religion and of a purpose for the *creche* which is the endorsement of the majoritarian religious viewpoint.

Judge Roberts held that the practice in dispute violated none of these standards. In this respect, the Plaintiffs submit that he erred.

Prayers at the opening session of the judiciary, the United States Court of Appeals, Fifth Circuit, are so patently unconstitutional as to need no other cite than *Engel v. Vitale, 370 U.S. 421 (1962)* which lays down the rule ". . . we think that the constitutional prohibition against laws respecting an establishment of religion *must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government."* at *p. 425*

A Writ of Mandamus should issue axiomatically to the United States Court of Appeal, Fifth Circuit, New Orleans, ordering a cessation of the prayer.

## CONCLUSION

For these reasons the Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, which affirms the decision of the District Court for the Western District of Texas, Austin Division.

This matter was brought, again, to the attention of the United States Supreme Court by application for temporary injunction, in both of the above indicated and styled cases, dated January 18, 1981.

Submitted as required by law,

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1st May 1981

Appendix A

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF TEXAS – AUSTIN DIVISION

O'HAIR v. CLEMENTS A-77-CA-237

MEMORANDUM OPINION AND ORDER
(Filed December 22, 1977)

Before the Court at this time is Plaintiffs' motion for a preliminary injunction. Plaintiffs wish to prohibit the exhibition of a nativity scene which is displayed in the rotunda of the Capitol of the state of Texas along with other holiday decorations. On December 21, 1977, the Court received evidence and heard arguments pertaining to the motion. This memorandum opinion and order shall constitute the Court's findings of fact and conclusion of law.

The evidentiary presentation made by the parties was, to say the least, meager. The nativity scene itself consists of figures of a man, a woman, and a child in a crib or manger. The nativity scene is placed under a large, decorated Christmas tree in the center of the Capitol rotunda. Two brightly wrapped boxes are also under the tree. Photographic evidence indicates that the tree is quite large, apparently having a height of at least 30 to 40 feet. The figurines, which are nestled against the base of the tree trunk, seem to be approximately two feet tall. The walls of the rotunda are festooned with garlands and ribbons. The same or similar items have been displayed in the Capitol during the holiday season for the past several years.

The indications are that the nativity scene is owned by the Texas Public Employees Association, a private organization. However, the objects are stored in the Capitol during the year. The various decorations to be used in the rotunda during the Christmas season are chosen by members of the TPEA, and members are the ones who put the decoarations in place. Much of this work seemingly is done during their official duty hours. Special illumination for the nativity scene may be supplied by the state.

Plaintiffs presented the testimony of a former Roman Catholic monk to the effect that the figurines portray the birth of Christ as related in the teachings of most Christian denominations. Of course there can be no doubt but that this is the import of the scene. However, the director of the State Board of

Control testified that the nativity scene was just one of the many traditional Christmas decorations to be displayed in the rotunda.

The factors which the Court must consider when passing on the motion for preliminary injunction are well settled: 1) whether there is a substantial likelihood that Plaintiffs will prevail on the merits ; 2) whether a substantial threat exists that Plaintiffs will suffer irreparable injury if the injunction is denied; 3) whether the threatened injury to Plaintiffs outweighs any harm which an injunction would cause Defendants; and 4) whether granting the injunction would disserve the public interest. *Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974).*

The Court is of the opinion that the decision on this motion is controlled by the clear failure of Plaintiffs to show a substantial likelihood of their prevailing on the merits of this suit. [1] The most substantial claim made by Plaintiffs is that the display of the nativity scene violates the Establishment Clause of the First Amendment.[2] The legal test to be applied in Establishment Clause cases is by now quite clear. The state action complained of will comport with First Amendment requirements only if it: 1) has a clear secular purpose; 2) has a principal or primary effect that neither advances nor inhibits religion; and 3) does not foster an excessive government entanglement with religion. *Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v.Kurtzman, 403 U.S. 602 (1971).* The only novelty here is that executive, rather than legislative, action is at issue.

The District of Columbia Circuit has had occasion to apply this test to a situation quite similar to the one before the Court today. *Allen v. Morton, 495 F.2d. 65 (D.C. Cir. 1973)* [prior appellate opinion, *Allen v. Hickel, 424 F.2d 944 (1970);* intervening district court opinion, *333 F. Supp. 1088 (1971)]*. The *Allen* case virtually controls the Court's decision in the present action.

In the *Allen* case federal government officials were involved in the planning and carrying out of a "Christmas Pageant for Peace," a project which had been undertaken for several years. The specific object of the complaint in that case was the presence of a life size, illuminated creche or nativity scene. Also featured on the pageant grounds across from the White House were the national Christmas tree, reindeer, yule logs, and a stage area for the presentation of musical and dramatic programs. The

court held that the pageant had a secular purpose of promoting tourism and manifesting the nation's desire for world peace, and that, taken as a whole, the pageant did not have a primary effect of advancing religion. It did however find excessive government entanglement with religion in the administration of the pageant, primarily because members of the government and the clergy were intimately involved in the organization of the pageant. In *Allen* the government neither owned the nativity scene, nor aided in the assembly, maintenance, or disassembly of the scene. The government did offer general technical and financial assistance to the pageant which undeniably conferred some incidental benefits on the nativity scene, but the court found that such assistance presented no constitutional problems.

In evaluating whether the state action complained of here has a secular purpose, the Court must look to the whole of the display in the Capitol rotunda, and not just to the nativity scene itself (which stanidng alone is unquestionably of a clear religious import). *Allen v. Morton, 495 F.2d* at *68-69.* In this case the nativity scene appears in the rotunda in conjunction with other objects, all of which are traditional decorative items associated with the holiday season which Plaintiffs admit have no religious significance. Similarly, the Court cannot help but take note of the fact that the Christmas season itself, for better or worse, has become largely a secular holiday, celebrated by the whole nation for a variety of purposes. *Woman Strike for Peace v. Hickel, 420 F.2d 597, 602-03 (D.C. Cir. 1969).* The Christmas and New Year season is seen as a time for special friendship among all peoples, and festive decorations of many kinds are used to kindle that spirit of kinship and joy in all. The nativity scene, while obviously having religious significance, has also become in many instances just another symbol of the holiday season. Indeed the only testimony elicited by Plaintiffs on this issue indicated that the nativity scene was intended as just another decoration for the Christmas tree in the Capitol. For all these reasons the Court doubts that Plaintiffs will be able to show on the merits that the action at issue did not have a clear secular purpose.

The test for determing the "primary effect" of state activities has been stated as follows:

> "Aid normally may be thought to have a primary effect of advancing religion [1] when it flows to an institution in

which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or [2] when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair, 413 U.S. 734, 743 (1973).*

The Court believes that only the second branch of the test could have any applicability here, and in applying that test it must be remembered that it is only activity which has the direct and immediate effect of advancing religion which is prohibited, a remote and incidental effect advantageous to religious institutions not being subject to constitutional objections. *Nyquist, supra, 413 U.S.* at *784.* And again the Court must look to the situation at the Capitol as a whole, and not just at the nativity scene in isolation. *Allen v. Morton, 495 F.2d at 74.*

Viewed with these guidelines in mind, the Court once more finds that Plaintiffs have failed to show the likelihood that the state has violated the primary effects prohibition. As noted earlier, the nativity scene is rather small, especially in relationship to the enormous Christmas tree under which it is nestled. Positioned as it is, the nativity scene could hardly be called the focal point of the decorations, and the figurines apprently could not be observed from many points in the rotunda. The proof indicates that the nativity scene is owned by a private group, although the state provides storage space for it in the off season. State funds may pay for the electricity used to light a bulb in the scene, and the scene may have been put into place by state employees on state time. However, the proof on these two questions is not altogether clear. Even assuming that the state does those things, the cost of lighting, assembling, and storing such a small display is almost inconsequential. That the state provides general help in terms of security, clean-up, sponsorhip, and the like appears to present no problem in light of the *Allen* case, at least if such items are available to others on a non-discriminatory basis — and no proof has been offered that such is not the case. All these factors lead the Court to conclude that at this stage of the litigation the Plaintiffs have shown no more than that the circumstances surrounding the display of the nativity scene in the Capitol confer some incidental benefit on religion. There now appears no substantial likelihood that they will be able to show more than this on the merits. Indeed, if the life size, illuminated creche present in the *Allen* case presented no

constitutional problem, it is unlikely that the modest nativity scene involved in this case will ultimately be proved to be any more objectionable.

Finally the Court must consider the prospect that Plaintiffs might show on the merits that there is an excessive entanglement between the state and religion in this case. Such excessive entanglement can occur from either 1) continuing administrative contact between church and state or 2) intensified political fragmentation and divisiveness along religious lines because of the need for continuing and growing appropriations to support the complained of aetivity. *Lemon v. Kurtzman, 403 U. S. 602 (1971)* Once more only the second prong of the test would seem to be relevant here, and it appears extremely unlikely that Plaintiffs will be able to place themselves within the ambit of that prohibition. For all the proof shows at this stage, the idea of displaying the decorations, including the nativity scene, originated with some state employee. There has been no evidence of the close contact with the religious community which was found to be objectionable in the *Allen* litigation. It also seems improbable that the activity at issue here is of the kind that would tend to cause the type of political divisiveness and financial drain that the United States Supreme Court felt it necessary to proscribe.

In closing it is appropriate to quote from Justice Douglas' opinion for the Supreme Court in *Zorach v. Clauson, 343 U.S. 306, 312-13 (1952):*

> The First Amendment, however, does not say that in every and all aspects there shall be a separation of Church and State. Rather, it studiously defines the manner, and specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly . . . Prayers in our legislative halls; the appeals to the Almighty in the message of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths — these and all other references to the Almighty that runs through our laws, our public rituals, our ceremonies would be flouting the First Amendment.

For all the reasons given above, it is ordered that the motion for preliminary injunction be, and hereby is, DENIED.

Entered this 22nd day of December 1977, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

[1] . Were this a case of first impression, the Court would feel that this complaint presented a substantial question concerning Plaintiffs' standing to bring this suit. *Doremus v. Board of Education, 342 U.S. 429 (1952); Sierra Club v. Morton, 405 U.S. 727 (1972)* However, on similar facts an appellate court has determined that no standing problem existed, and this district court would be reluctant to now hold otherwise in this action. *Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970)*

[2] . Plaintiffs also alleged violations of the Free Exercise and Equal Protection Clauses, but no evidence on such violations was presented. Indeed there is no allegation of the coercion which would be prerequisite to a Free Exercise claim. *Abington School District v. Schempp, 373 U.S. 202, 223, (1972).* The viability of an equal protection claim is also doubtful. *Allen v. Morton, 495 F.2d 65, 76 n. 19 (D.C. Cir. 1973).*

Appendix B

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF TEXAS – AUSTIN DIVISION

O'HAIR v. CLEMENTS A-77-CA-237

PRE-TRIAL ORDER
(May 8, 1979)

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to the instructions of the court set forth in its order preliminary to pretrial conference between attorneys of March 13, 1979, counsel for both parties in the above styled action submit for the court's approval this pretrial order.

1. Simultaneous with the filing of this pretrial order containing stipulated facts, the plaintiffs file their motion for leave to amend the complaint, which said amended complaint (1) waives the demand for damages of $9,000,000.00 contained in the original complaint, (2) waives the demand for preliminary injunction contained in the original complaint, (3) adds to said complaint a requested relief from use of the Capitol of Texas building and grounds for celebration of the Jewish Hanukkah celebrations or any other celebration of any religious or pagan event. Simultaneous also with the filing of this pretrial order are filed motions for summary judgment by both the plaintiffs and the defendants and a motion for substitution of parties for the defendant officeholders who have been succeeded in office by other persons.

2. Counsel of all parties hereto stipulate to the following

a. Facts stated by this Honorable Court in its *Memorandum Opinion and Order* on motion of Plaintiffs for preliminary injunction, said opinion dated December 22, 1977.

b. Facts stated by each of the three defendants, Dolph Briscoe, John Hill, and Homer Foerster in their answers to plaintiff's (sic) interrogatories on file in this case.

c. The following statement by counsel for plaintiffs and defendants. "The State Board of Control of Texas is responsible for control of displays in and on capitol grounds and in the capitol building of Texas by reason of Article 665 V.A.C.S. and 678e V.A.C.S. Requests by individuals for use of these areas is processed by the State Board of Control under their (sic) regulations contained in the Texas Register, Sections 028.11.020 and

.021.

Permission for use of these areas in celebration of the Christmas season has been granted several years in the past, at least 17 years according to the testimony of Homer Foerster, defendant herein. In 1977, 1978 and 1979, permission for use of the Capitol Building for holding a Christmas celebration has been granted to the Texas Public Employees Association, in which the three local Austin chapters of the Association, Capitol Chapter No. 2, Capitol Chapter No. 196, and Bluebonnet Chapter No. 197, have displayed figurines of a man, woman, and child wth the Christmas decorations in the Rotunda of the Capitol Building. Such figurines depict Joseph, Mary and Jesus Christ and events surrounding the birth of Jesus Christ in the Christian religious tradition, especially as such birth narrative is represented in the Gospel according to St. Luke. Such cluster of figurines is commonly known as a nativity scene, a creche, or a manger scene.

The Executive Director of the Texas Board of Control, Homer Foerster, also granted permission on request of Sharon Weintraub of Austin, to observe a Hanukkah or Jewish Festival of Lights program on December 24, 1978 at 5:30 p.m. The permission was granted by letter to Ms. Weintraub dated October 12, 1978. Such celebration was held in the Capitol Rotunda of the Texas Capitol Building in which a menorah or candelabrum used in Jewish worship was displayed.

The nativity scene is stored between times of annual use in the Capitol Building Rotunda and during times of use it is lighted by electric power by the State of Texas. After the Christmas display, the nativity scene is dismantled and stored by employees of the State of Texas, who are also members of Texas Public Employees Association, during their regular duty hours. In 1979, state employees in Austin, Texas were excused from regular duties at 3:15 p.m. on December 19, 1979 to attend the "Christmas Carole (sic) Hour" in the Capitol Rotunda, an event sponsored by the Texas Public Employees Association Capitol Chapters and announced by the Governor, Dolph Briscoe, by proclamation. In the Texas Register of November 14, 1978, the Texas Board of Control proposed to amend Rule .021 in order to change the phrase "public purpose" in that Rule to "governmental purpose". The phrase "governmental purpose" in the proposed rule would be required for special use of the Capitol Rotunda and "A request shall not be considered to be for a governmental purpose if:

(d) it is to observe or celebrate a religious or pagan event, or to conduct a meeting or gathering concerning a subject or purpose that is essentially religious or pagan."

The scheduled hearing on the proposed regulation was December 15, 1978 but such hearing was not held and the proposed change in the Rule was not adopted.

In 1979 the Texas Public Employees Association was granted permission for the annual Christmas celebration in the Capitol Rotunda but employees of the Texas Board of Control did not, as part of their official duties, supply the christmas tree nor erect the displays, including the creche and the menorah.

3. Plaintiff's (sic) concise summary of the ultimate facts: Each year during recent years the Texas Board of Control has granted permission for the Texas Public Employees Association to use the Capitol Rotunda for celebration of the Christmas season, a celebration which included the display of a creche or nativity scene, essentially religious in the fact that such creche depicts the birth of Jesus Christ according to the Christian tradition. In 1979, the Texas Board of Control also granted permission to a local resident of Austin to hold a Hanukkah celebration in the Capitol Rotunda, a celebration which included the display of a menorah, essentially religious in the fact that such menorah was used in celebration of the Jewish Festival of Lights and is a candelabrum associated with Jewish worship."

Defendant's concise summary of the ultimate facts: The Texas Board of Control has granted permission to the Texas Public Employees Association to place a small nativity scene, among the other decoration, with the Christmas tree displayed in the Capitol Rotunda each year. In 1979 permission to display a menorah during Hanukkah in connection with the Jewish festival of Lights was also granted by the State Board of Control. Neither of these displays is owned by the State.

4. No exhibits for the plaintiffs or defendants will be submitted as it is anticipated that the case may be decided on motion for summary judgment by each of the parties.

5. Contested issue of law:

a. Is the display of a creche or nativity scene as a representation of the birth of Jesus Christ in the Christian tradition in the Texas Capitol Rotunda a display which has a "clearly secular purpose"?

b. Does permission by the Texas Board of Control for holding a Christmas celebration or Christmas Caroling by state em-

ployees and others in the Texas Capitol Rotunda, including the display of a creche, the storage of the creche off season, and the use of state facilities and electric lights for such display foster government entanglement with religion?

c. Do the Christmas celebration and display of the creche have a primary or principal effect that neither advances or inhibits religion?

d. Is the display of a Jewish menorah and a celebration of the Jewish Festival of Lights in the Capitol Rotunda in the Jewish religious tradition, for "clearly secular" purpose?

e. Does such display of a menorah and celebration of the Jewish Festival of Lights have a principal or primary effect which neither advances nor inhibits religion?

f. Does such display of a menorah and celebration of the Jewish Festival of Lights foster governmental entanglement with religion?

6. Neither plaintiffs nor defendants plan to call additional witnesses at this time as it is anticipated that the ultimate issues can be decided in rulings on motions for summary judgment and by reference to the stipulations of facts contained herein.

7. Plaintiff (sic) requests by separate motion for leave to file amendment of plaintiff's (sic) pleadings as hereinabove stated in paragraph 1.

8. Briefs for plaintiffs and defendants are submitted as memorandum of authorities submitted with the respective motions for summary judgment filed simultaneously herewith.

9. Proposed findings of facts are those contained herein in paragraph 2.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant

DOUGLAS B. OWEN
Assistant Attorney General

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/s/ Paul Funderburk
PAUL FUNDERBURK

ATTORNEY FOR PLAINTIFFS

Appendix C

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF TEXAS – AUSTIN DIVISION

O'HAIR v. CLEMENTS A-77–CA 237

ORDER
(Filed January 31, 1980)

Came on this day for consideration by the Court cross-motions for summary judgment by Plaintiffs and Defendants. This is a suit by Plaintiffs, residents and taxpayers of the State of Texas, for a declaratory judgment that it is contrary to the Establishment Clause of the First Amendment for the State to permit private parties to display a small "creche" or Christian Nativity scene, or a Jewish menorah or candelabra, in the rotunda of the State Capitol Building during the Christmas and Hanukkah seasons, and to permit celebrations or observances of those holidays in the rotunda. Plaintiffs also seek an injunction against the continued permission by the State of such observances and displays.

The facts in this case are not in dispute. Most of the pertinent facts, as agreed to and stipulated by the parties, are set forth in this Court's *Memorandum and Opinion and Order* of December 22, 1977, denying Plaintiffs' motion for a preliminary injunction. (A copy of that *Memorandum Opinion and Order* is attached hereto and incorporated herein for all purposes.) The Order denying the preliminary injunction was affirmed by the United States Court of Appeals for the Fifth Circuit. *O'Hair v. Briscoe, F.2d , No. 77-3494 (5th Cir., Jan. 6, 1978).* The remaining stipulated facts are set forth in Paragraph 2 of the Pre-Trial Order submitted by the parties on May 8, 1979. That stipulation states as follows:

> The State Board of Control is responsible for control of displays in and on the Capitol grounds and in the Capitol Building of Texas by reason of Article 665, V.A.C.S. and 678e, V.A.C.S. Requests by individuals for use of these areas is processed by the State Board of Control under their (sic) regulations contained in the Texas Register, Sections 028. 11.020 and .021.

Permission for use of these areas in celebration of the Christmas season has been granted several years in the past, at least seventeen years according to Defendant Homer Foerster, Director of the State Board of Control. In 1977, 1978, and 1979, permission for use of the Capitol Building for holding a Christ-

mas celebration has been granted to the Texas Public Employees Association, in which the three local chapters of the Association – Capitol Chapter No. 2, Capitol Chapter No. 196, and Capitol Chapter No. 197 – have displayed figurines of a man, woman, and child with the Christmas decorations in the rotunda of the Capitol Building. Such figurines depict Joseph, Mary, and Jesus Christ in the Christian religious tradition, especially as such birth narrative is represented in the Gospel according to St. Luke. Such cluster of figurines is commonly known as a nativity scene, a creche, or a manger scene.

The Executive Director of the Texas State Board of Control, Homer Foerster, also granted permission on request of Sharon Weintraub of Austin to observe a Hanukkah or Jewish Festival of Lights program on December 24, 1978, at 5:30 p.m. The permission was granted by letter to Ms Weintraub dated October 12, 1978. Such celebration was held in the Capitol Rotunda of the Texas Capitol Building, in which a menorah or candelabrum used in Jewish worship was displayed.

The nativity scene is stored between times of annual use in the Capital Building, and during times of use it is lighted by electric power by the State of Texas. After the Christmas display, the nativity scene is dismantled and stored by employees of the State of Texas who are also members of the Texas Public Employees Association, during their regular duty hours. In 1978, state employees were excused from regular duties at 3:15 p.m. on December 19 to attend the "Christmas Carol Hour" in the Capitol Rotunda, an event sponsored by the Texas Public Employees Association Capitol Chapters and announced by the Governor, Dolph Briscoe, by proclamation.

In the Texas Register of November 14, 1978, the Texas Board of Control proposed to amend Rule .021 in order to change the phrase "public purpose" [the Rule currently reading the use of the Capitol must be for a public purpose] to "governmental purpose." The phrase "governmental purpose" in the proposed rule would be required for special use of the Capitol Rotunda, and the proposed rule would state:

> "A request shall not be considered to be for a governmental purpose if: ***
>
> (d) it is to observe or celebrate a religious or pagan event, or to conduct a meeting or gathering concerning a subject or purpose that is essentially religious or pragan."

The scheduled hearing on the proposed regulation was December 15, 1978, but such hearing was not held and the proposed change in the Rule was not adopted.

In 1979 the Texas Public Employees Association was granted permission for the annual Christmas celebration in the Capitol Rotunda, but employees of the Texas Board of Control did not, as part of their official duties, supply the Christmas tree nor erect the displays, including the creche and the menorah.

In light of the above facts, the Court is of the opinion that Defendants' motion for summary judgment is meritorious, and that Defendants are entitled to judgment as a matter of law. The Court expressly adopts the legal reasoning and conclusions set forth in the *Memorandum Opinion and Order* of December 22, 1977, and is of the opinion that the additional facts set forth in the above stipulation do not alter those conclusions. The Court remains convinced that Defendants' actions reflect a clearly secular purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive entanglement with religion. See *Commitee for Public Education v. Nyquist, 412 U.S. 756, 773 (1973).* The incidental, remote and *de minimis* benefit which may be conferred upon certain religions by the State permitting private parties to display a small Nativity scene and a menorah in the Capitol sufficiently distinguishes this case from *Citizens Concerned for Separation of Church and State v. The City and County of Denver,* ___ *F. Supp.* ___ *(D. Colo., December 17, 1979),* where a life-size Nativity scene was prominently displayed in front of the Denver City Hall for the express purpose of promoting Christian doctrine, and where the government clearly purchased, maintained, and assembled the display. To the extent, however, that the two cases may be indistinguishable, this Court respectfully differs with the District Court of Colorado with respect to the First Amendment implications of the government permitting such a display as is the issue in the present case.

It is accordingly

ORDERED, ADJUDGED, and DECREED that Plaintffs' Motion for Summary Judgment be, and hereby is, DENIED; and that Defendants' Motion for Summary Judgment be, and hereby is, GRANTED.

Entered this 31st day of January, 1980, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
CHIEF UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Unit A

O'HAIR v. CLEMENTS No. 80-1159

Appeal from the United States District Court
for the Western District of Texas

February 2, 1981

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and Hunter*, District Judge.

PER CURIAM:

DO NOT PUBLISH

Affirmed. See Local Rule 21.

AFFIRMED

*District Judge of the Western District of Louisiana, sitting by designation.

*Local Rule 21: see N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F2d 966.*

Appendix E

ORDER

[in the case of O'HAIR v. HILL, No. 79-1397]
dated: July 7, 1980

Having been offended by (when they first encountered) the prayer in the United States Court of Appeals for the Fifth Circuit on June 5, 1980 in the case of *Hunter v. D.I.S.D., No. 78-3648,* Petitioners asked for a ruling on the possible discontinuance of the prayer for a case set for oral argument on July 16th, *O'Hair v. Hill, No. 79-1397.* On July 7th, 1980, they were advised, by telephone, by Barry Stiebing, Deputy Clark, that Charles Clark, Presiding Judge in that case, had issued an internal memorandum on the request to wit:

"Unless ordered to do otherwise the Court will be opened with prayer on July 16, 1980 precisely as it always has been.

"Ms. (sic) O'Hair may remove herself from the courtroom during the opening announcement.

Signed, Charles Clark."

This matter was brought to the attention of the United States Supreme Court by application for temporary injunction, dated July 10, 1980.

When the case at bar was set for 29th January, 1981, together with the case of *O'Hair v. Clements, No. 80-1159* in the United States Court of Appeals for the Fifth Circuit set for 28th January, 1981, a second request was made of the court and again the Petitioners were notified that the prayer would continue and that they could leave the court room during the prayer. Subsequently, a Motion to Terminate Opening Prayer was filed in both cases on January 17th, 1981.

Appendix F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

MOTION TO HAVE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA, DISCONTINUE THE PRACTICE OF OPENING THE COURT SESSIONS WITH A PRAYER
OR
ALTERNATELY REQUESTING THOSE JUSTICES WHO PARTICIPATE IN PRAYER TO RECUSE THEMSELVES FROM THE HEARINGS ASSOCIATED WITH AMERICAN A-

THEISTS IN THE ABOVE INDICATED AND STYLED CASES ON JANUARY 28TH, JANUARY 29th' 1981 RESPECTFULLY.

To each and every and to all of the Justices of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, being Chief Justice John R. Brown, Senior Circuit Justices Richard T. Rives, Albert P. Tuttle, Warren L. Jones, John Minor Wisdom, Walter Tettus Gewin, Homer Thornberry, David W. Dyer, Bryan Simpson, Lewis R. Morgan, Joe McDonald Ingraham, and Circuit Justices James P. Coleman, Irving L. Goldberg, Robert A. Ainsworth, John C. Godbold, Charles Clark, Paul H. Roney, Thomas Gibbs Gee, Gerald Bard Tjoflat, James C. Hill, Peter T. Fay, Alvin B. Rubin, Robert F. Vance, Phyllis A. Kravitch, Frank M. Johnson, Jr., Renaldo G. Garza, Albert J. Henderson Jr., Thomas M. Reavley, Henry Politz, Joseph W. Hatchett, R. Lanier Anderson III and Carolyn Deneen Randall.

Applicants Dr. Madalyn Murray O'Hair and Jon Murray herewith move that the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, discontinue the court's practice of opening the court sessions with a prayer.

Applicants seek to preserve at least the appearance of neutrality of the Court in respect to the First Amendment to the Constitution of the United States and the Establishment Clause thereof and to preserve the jurisdication of the Court and keep it free from error which may taint the judgments which it issues.

Applicants especially seek a discontinuance of such prayer for the opening sessions on January 28th and January 29th, 1981 when the above indicated and styled cases respecting the rights of American Atheists will be subjects of oral agrument before the court.

The case of *O'Hair v. Cooke, No. 80-1142* involves the offering of prayer at the opening of the City Council of Austin, Texas. Since the United States Court of Appeals for the Fifth Circuit itself opens with a prayer it repeats the offense of which the Appellants complain and cannot offer the appearance of neutrality which is required of a governmental, particularly a judiciary, body.

The case of *O'Hair v. Clements, No. 80-1159* involves the display of a creche of Christian nature and the Menorrah of the

Jewish faith in the rotunda of the capitol building in Austin, Texas. Since the Appellants are Atheists, an appearance before a judiciary which demonstrates its antipathy to Atheism by its engagement in a recognition of a god; and an offer of prayer to him (her, it) deprives the Appellants of an impartial tribunal, in derogation to the First, and Fourteenth Amendments to the Constitution of the United States.

Applicants Madalyn Murray O'Hair and Jon G. Murrary are, and will continue to be litigants in cases involving the civil libertarian rights of American Atheists and will, therefore, on many occasions be, and have been, before the United States Court of Appeals for the Fifth Circuit since the national base of this group, American Atheists, is in Austin, Texas.

Applicants are Madalyn Murray O'Hair, an internationally known Atheist leader and Jon G. Murray, Director of the American Atheist Center of Austin, Texas.

All of which indicates that prayers in the United States Court of Appeals for the Fifth Circuit will continue to be the subject of friction and appeal as relief from the oppression of government composed and endorsed prayers is sought by Applicants of this Motion.

The grounds for this Motion are set out with more specifity in the accompanying Affidavit and Memorandum of Law. Wherefore, the Applicants of this Motion ask that the Motion be granted and the prayers struck.

Alternately, it is asked that those justices who participate in opening prayer recuse themselves for bias as is more fully set out in the accompanying Memorandum of Law.

Submitted by
Madalyn Murray O'Hair, pro se
Jon G. Murray, pro se

An accompanying Affidavit set out the nature of the prayer invovled to be an 11- word prayer composed (apparently) by the court being "Oyez, Oyez. God save our nation and this honorable court. Amen."

The Motion was denied in open court on January 28, 1981 and again on January 29, 1981.

and again on January 29, 1981.

This matter was brought, again, to the attention of the United States Supreme Court by application for temporary injunction, in both of the above indicated and styled cases, dated January 18, 1981.

## PROOF OF SERVICE

We, Madalyn O'Hair, *pro se*, and Jo n G. Murray, *pro se*, hereby certify that on the 2nd day of May, 1981, we served copies of the foregoing Petition for Writ of Certiorari on the City of Austin and the Solicitor General of the United States and the United States Department of Justice by mailing a copy in a duly addressed envelope, with postage prepaid to:

City Attorney, City of Austin, Texas, 708 Colorado St., Austin, TX 78701, to The Solicitor General, Department of Justice, Washington, D. C. 20025 to the U. S. Department of Justice, Civil Division 10th and Constitution Avenues, Washington, D. C. 20530 and to the Clerk, U.S. Court of Appeals, Fifth Circuit, 600 Camp St., Room 102, New Orleans, Louisiana 70130.

Madalyn Murray O'Hair, *pro se*

Jon G. Murray, *pro se*

c/o The American Atheist Center
2210 Hancock Drive, Austin, TX 78756
[mailing address: P. O. Box 2117 Austin, TX 78768]
[512] 458-1244

[Revised and reprinted Petition for Writ of Certiorari served by certified mail under date of May 14th, 1981, to all counsels of record listed above.]

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1908

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

**MADALYN MURRAY O'HAIR**
**and**
**JON G. MURRAY,**
*Petitioners,*

**v.**

**WILLIAM CLEMENTS, et al,**
*Respondents,*

**On Petition For Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

**MARK WHITE**
**Attorney General of Texas**

**JOHN W. FAINTER, JR.**
**First Assistant Attorney General**

**RICHARD E. GRAY, III**
**Executive Assistant Attorney General**

**PAUL R. GAVIA**
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**P. O. Box 12548, Capitol Station**
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**(512) 475-3131**

*Attorneys for Respondents*

## QUESTIONS PRESENTED

I. Whether Petitioners have standing.

II. Whether the State's permitting private parties to display a small creche and a menorah in the Capitol rotunda in observance of the holiday season violates the Establishment Clause of the First Amendment to the Constitution.

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### CONSTITUTIONAL PROVISIONS


| | |
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NO. 80-1908

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1980**

---

**MADALYN MURRAY O'HAIR**
**and**
**JON G. MURRAY,**

*Petitioners,*

**v.**

**WILLIAM CLEMENTS, Governor of Texas; MARK WHITE, Attorney General of Texas; and HOMER A. FORESTER, Director of Texas State Board of Control;**

*Respondents,*

---

**On Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**for the Fifth Circuit**

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# RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COME William Clements, Governor of the State of Texas; Mark White, Attorney General of the State of Texas; and Homer A. Foerster, Director of Texas State Board of Control (currently State Purchasing and General Services Commission); and in response to the Petition for Writ of Certiorari submit this Brief in Opposition.

## JURISDICTION

Petitioners incorrectly invoke jurisdiction pursuant to the Rules of the Supreme Court of the United States, including Rule 17 (a); the courts below decided the issues in accord with precedent. Further, Respondents assert that Petitioners have no standing to bring their claims under the Establishment Clause.

The judgment of the Court of Appeals (Petition for Writ A. 15a) was signed on February 2, 1981; a petition for writ of certiorari was subsequently filed by Petitioners. In their complaint filed in the federal district court on December 13, 1977, Petitioners alleged jurisdiction pursuant to the First and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. §§1983, 1985, and 1986; and 28 U.S.C. §1343.

## CONSTITUTIONAL PROVISIONS

Petitioners attempted to prove their claims below based on the Establishment Clause of the First Amendment to the United States Constitution. Respondents assert that Petitioners have no standing and, therefore, the requirements of Article III §2 of the United States Constitution have not been met.

## STATEMENT OF THE CASE

Petitioners filed their complaint in district court on December 13, 1977. Alleging that the display of a creche in the Capitol rotunda established a religion under color of the state law and thereby violated their constitutional rights, Petitioners sought declaratory and injunctive relief, punitive damages, and attorney fees. Through the pretrial order of May 8, 1979, (Petition A.7a-11a), Petitioners deleted their monetary claim

and added allegations concerning the display of the menorah and use of the Capitol rotunda for purposes related to Hanukkah.

On December 22, 1977, the district court denied Petitioners preliminary relief (Petition A pp. 1a-6a) and the Fifth Circuit denied mandamus.

After the parties filed their pretrial order which included stipulations mutually agreed to, the district court made its final decision on cross-motions for summary judgment (Petition A. 12a-14a). The district court considered the stipulations and claims in the parties' pretrial order, adopted the court's December 22, 1977, order, and granted Respondents' motion for summary judgment.

The district court's opinion was affirmed by the Fifth Circuit on February 2, 1981 (Petition A. 15a) and Petitioners petitioned for writ of certiorari in this Court.

## OPINIONS BELOW

The opinions of the District Court for the Western District of Texas, Austin Division, are not reported and are reproduced in the Appendix to the Petition for Writ of Certiorari, pages 1a-6a, 12a-14a. The opinion of the Court of Appeals for the Fifth Circuit is reported at 638 F.2d 1231 (5th Cir. 1981) and is reproduced in the Appendix to the Petition for Writ of Certiorari, page 15a.

## SUMMARY OF THE ARGUMENT

Because Petitioners have shown no more than generalized ideological interests, they have no standing and this Court is without jurisdiction to decide their claims on the merits. However, if standing is found,

Respondents properly permitted the inclusion of a small creche as a decoration under the Christmas tree and the display of a menorah as holiday observances which had a secular purpose and primary effect neither advancing nor inhibiting religion and which presented no danger of entangling the government with any religion.

## ARGUMENT

### I. WHETHER PETITIONERS HAVE STANDING

A party asserting standing must show "injury in fact." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-74 (1952). This Court has not found it sufficient merely to assert one's vital interest as a citizen in the establishment issue, *Flast v. Cohen*, 392 U.S. 83, 115-116 (1968) (Fortas, J., concurring), although some courts of appeal have found similar allegations confer standing. *Americans United for Separation of Church and State, Inc., v. United States Department of Health, Education, and Welfare*, 619 F.2d 252, 254 (3rd Cir. 1980) but *see* (Weis, J., dissenting); *Allen v. Hickel*, 424 F.2d 944, 946-947 (D.C. Cir. 1970); *see* also Appendix A 6a, Petition for Writ of Certiorari herein.

Petitioners have alleged no more than an interest shared by all other citizens in the rule of law. A generalized interest enforceable by any citizen has no boundaries and, thus, brings into question the limits of the jurisdiction of federal courts under Article III of the United States Constitution. U.S. CONST. ART. III, §2; *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 226-227 (1973). Since Petitioners have neither alleged nor shown that they were directly affected by the action which they challenge, this Court is without jurisdiction to decide their claim on the merits.

## II.

## WHETHER THE STATE'S PERMITTING PRIVATE PARTIES TO DISPLAY A SMALL CRECHE AND A MENORAH IN THE CAPITOL ROTUNDA IN OBSERVANCE OF THE HOLIDAY SEASON VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

### A. PURPOSE

The Establishment Clause does not proscribe governmental display of objects which have religious significance. *Allen v. Hickel,* 424 F.2d at 948. In order to conform to constitutional requirements, governments' actions must not have a primary effect which either advances or inhibits religion. To aid in exercising appropriate discretion in matters involving religion, this Court has provided guidelines for use in deciding whether governmental actions are neutral. Governmental conduct meets constitutional standards if the purpose of the action is secular; its primary effect neither advances nor inhibits religion; and it does not foster excessive entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 (1971).

In determining the purpose of any action, the context must be considered. *Florey v. Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980); *Allen v. Hickel,* 424 F.2d at 948-949; *Citizens Concerned for Separation of Church and State v. City and County of Denver,* 508 F.Supp. 823, 827 (D. Colo. 1981). In the instant case, the display,of which the small creche complained of here was a part, included a huge Christmas tree hung with ornaments, brightly wrapped boxes, and garlands.

Characterization, in isolation, of a symbol as religious does not resolve the question of whether its display on government property violates the First Amendment.

Religious symbols are frequently used for secular purposes. They are worn as jewelry, incorporated into various designs, and appreciated for their esthetic qualities without regard to their religious significance. Since persons often bring their own meanings to symbols or interpret symbols in light of the context in which they are experienced, it cannot be assumed that every display of a religious symbol is for a religious purpose or has a religious effect. *Citizens Concerned,* 508 F.Supp. at 829.

Thus, even though the nativity scene is a religious symbol, it may be experienced by viewers as having a variety of meanings. For example, the viewer may perceive a statement about the value of family life, of humility, of poverty, or may see simply a depiction of the simple joy parents take in a newborn child. Undoubtedly, the creche may also be seen as a holiday decoration. In fact, it appears in store window displays, on postage stamps, as tree ornaments, on holiday greeting cards, and has become a familiar part of the folklore of our culture. *Citizens Concerned,*508 F. Supp. at 828.

Petitioners produced no evidence that the nativity scene was anything other than a decoration. The trial court properly concluded, therefore, that its display had a clear secular purpose.

B. EFFECT

What is proscribed by the Establishment Clause is governmental action with a primary or substantial religious effect. *Lemon,* 403 U.S. at 612-613; *Allen v. Hickel,* 424 F.2d at 949; *Citizens Concerned,* 508 F.Supp. at 827. When a government either aids an institution the functions of which are pervaded with a religious mission or benefits a "specifically religious activity" in a "substantially secular setting," the govern-

ment's action has a primary effect of advancing religion. *Hunt v. McNair,* 413 U.S. 734, 743 (1973).

Petitioners' allegations and proof as to effect are wholly speculative. No showing was made that any governmental aid was conferred upon any entity. Certainly, it was not shown that any religious institution benefited by the complained of governmental activity. Even if it is assumed that some benefit did accrue, only those benefits which have a direct and immediate effect of advancing religion are constitutionally infirm. *Committee for Public Education and Religious Liberty v. Nyquist,* 431 U.S. 756, 784 (1973). Effects which are remotely or incidentally beneficial do not violate the Establishment Clause. *Nyquist,* 431 U.S. at 784.

C. ENTANGLEMENT

Discussion of entanglement problems has occured in cases involving governmental aid to sectarian institutions, rather than in fact situations similar to those presented in this case. Applying the following four factors in the entanglement test to these facts illustrates how far afield this case is from a genuine claim under the Establishment Clause: (1) nature of the institutions benefited, (2) type of government aid provided, (3) resulting relationship between the government and the benefited institutions, and (4) likelihood that the governmental action will create political divisiveness. *Lemon,* 403 U.S. at 615, 622-623.

Here, it is not known which religious institutions purportedly benefited; Petitioners have named none. Nor can it be determined what kind of aid was allegedly provided; apparently Petitioners believe that the display is a benefit *per se.* Similarly, no relationship between the state government and any religious institution resulted from the holiday display. Finally, no religious groups participate in the decorating of the rotunda, and there is

an absolute absense of any showing that the modest display has engendered or is likely to engender any political divisiveness. In fact, Respondents assert that excessive entanglement could result if the government were to attempt to expunge all displays of symbols with religious significance from every activity on government property.

The menorah apparently was displayed for the same purpose set out above. It was merely a depiction of another manner in which the holiday season is celebrated by those whose heritage includes a Jewish background. Petitioners made no showing of any religious purpose, effect, or entanglement flowing from the display of the menorah. Therefore, it must be concluded that permitting the display of the menorah was appropriately neutral government conduct. *See Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952).

## CONCLUSION

The Petitioners are not seeking governmental neutrality. They are asking for affirmative action which would require removing any allusion to religion from every building owned by the government and from every function performed by the government.If the activity complained of herein were found to contravene the First Amendment, a prohibition would result rather than the exercise of commonsensical, enlighted, and reflective governmental discretion.The Constitution of the United States does not now, and should not hereafter, require the ban or expungement contemplated by the Petitioners.

For the reasons set out above, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

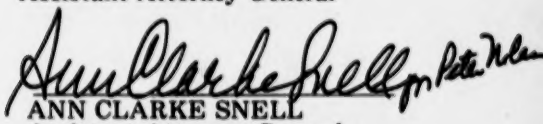
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## CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Respondents' Brief in Opposition have on this the 7th day of August, 1981, been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

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